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In the Supreme Court of the United States

OCTOBER TERM, 1976

FLOYD T. FULLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 544 F. 2d 519.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1976. A petition for rehearing was denied on November 19, 1976 (Pet. App. B). On December 9, 1976, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to January 18, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied any constitutional or statutory rights by the government's routine destruction

of its agents' rough interview notes after the notes had been incorporated into a report summary, by its failure to produce those notes before the grand jury, or by its failure to disclose certain statements of its witnesses until the trial had commenced.

2. Whether the district court abused its discretion in denying petitioner's motion for a severance.

3. Whether the district court erred in denying petitioner's recusal motion.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of extortion, in violation of 18 U.S.C. 1951, three counts of making false declarations to a grand jury, in violation of 18 U.S.C. 1623, and two counts of filing false income tax returns, in violation of 26 U.S.C. 7206. He was sentenced to concurrent five-year terms of imprisonment on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner, a County Commissioner of Cook County, Illinois, extorted substantial sums of money from various land developers in return for favorable action on rezoning applications. In order to conceal receipt of the extorted sums, petitioner filed false federal income tax returns for the years 1968 and 1970. In addition, while appearing before a federal grand jury in the summer of 1974, petitioner falsely denied that he had extorted money and falsely testified about the price that he had paid for a house in Florida that was bought with the proceeds of the illegal payments.

Specifically, the proof showed that Thomas Origer was the president of Origer Builders, Inc., a company that

bought, developed and sold large plots of real estate within Cook County (Tr. 430-432). In December 1968, Origer applied for a zoning change of a 96-acre tract of land from single-family to general residence so that his company could construct a unit development. Although the request was approved by the Zoning Board of Appeals, it was deferred by petitioner (Tr. 354, 357). Petitioner then met with Origer and demanded $10,000 in return for his assistance in obtaining the zoning change (Tr. 507-508). After Origer paid petitioner the money (Tr. 508), the rezoning application was approved (Tr. 516).[1]

From 1960 to 1972, Sellergren, Inc., was engaged in real estate development and management (Tr. 929-930). During that time the company purchased a 66-acre plot of land in Cook County for the purpose of constructing several 450 unit apartment buildings on the property (Tr. 933-935). In order to obtain zoning approval for the project, the company elicited the assistance of William Adams, a general contractor, and promised Adams that he would be given the opportunity to obtain the plumbing, heating, sprinkler and air conditioning contracts for the development if he could secure the necessary zoning authorization (Tr. 833, 1037). After petitioner deferred the proposal on several occasions (Tr. 368-375), he agreed to accept $20,000 in return for his cooperation. In June 1970, Adams paid petitioner the money (Tr. 861-865) and the zoning change was granted (Tr. 866).

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[1]Petitioner also extorted payments from Origer in 1966, 1967, and 1968 in return for similar favorable treatment on rezoning applications (Tr. 446-449, 458, 469-470, 477-478, 489-8).

In July 1970, petitioner purchased a house in Hollywood, Florida, for $45,000, making a $20,000 down payment (Tr. 1099-1101, 1229). At petitioner's request, however, the contract and other pertinent papers were drafted to reflect a $35,000 purchase price and a $10,000 down payment (Tr. 1100). In 1974, petitioner testified before the grand jury that he had purchased the home for $35,000 and had paid $10,000 in cash as a down payment (Tr. 1163-1164). Petitioner also denied that he had ever received payments from Origer or Adams (Tr. 794, 796, 496, 798-801, 1156). In addition, he failed to report those payments on his 1968 and 1970 federal tax returns (Tr. 1240-1243, 1268-1272).

ARGUMENT

1. Petitioner contends (Pet. 29-34) that the government abused the grand jury process by destroying certain interview notes and by presenting to the grand jury a "laundered" summary of those interviews, which contained statements favorable only to the government.[2] Furthermore, petitioner claims that the government withheld exculpatory evidence by failing to supply him with certain witness statements prior to trial. The court of appeals correctly rejected these contentions.

a. Contrary to petitioner's assertion, the government did not deceive the grand jury in an attempt to obtain an

[2]Prior to trial, government witnesses Origer, Adams and Zizzo were interviewed by agents of the Federal Bureau of Investigation and the Internal Revenue Service and by various Assistant United States Attorneys. Pursuant to routine procedures, the notes taken during the course of those interviews were incorporated into a summary statement and were then destroyed. The summaries were presented to the grand jury and were given to petitioner. In addition, petitioner was provided with statements of Origer that had not been incorporated into the interview summary (Tr. 486-487).

indictment. This claim apparently relates to the fact that Origer, Adams, and Joseph Zizzo (from whom petitioner had purchased his Florida home) had stated in their initial interviews with the government that their transactions with petitioner had been legitimate; only later did they admit their complicity with petitioner in his illegal activities. Although the government did not inform the grand jury of the witnesses' earlier, exculpatory denials, a grand jury proceeding is not an adversary hearing to determine guilt or innocence. "Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States* v. *Calandra*, 414 U.S. 338, 343-344. Therefore, a defendant has no right to present evidence to rebut the prosecutor's presentation (*United States* v. *Y. Hata & Co., Ltd.*, 535 F. 2d 508, 512 (C.A. 9), certiorari denied, No. 75-1767, October 4, 1976), and the government is not obliged to present all available witnesses (*United States* v. *Eucker*, 532 F. 2d 249, 256 (C.A. 2), certiorari denied, No. 76-5340, January 10, 1977) or to produce evidence that undermines the credibility of its witnessess (*United States* v. *Gardner*, 516 F. 2d 334, 338-339 (C.A. 7), certiorari denied, 423 U.S. 861).[3] Especially since it had strong reason to doubt the veracity of the initial exculpatory statements made by Origer, Adams and Zizzo, the government proper-

[3]See also *Loraine* v. *United States*, 396 F. 2d 335, 339 (C.A. 9), certiorari denied, 393 U.S. 933; *Jack* v. *United States*, 409 F. 2d 522, 524 (C.A. 9); *United States* v. *Addonizio*, 313 F. Supp. 486, 495 (D.N.J.), affirmed, 451 F. 2d 49 (C.A. 3), certiorari denied, 405 U.S. 936.

ly determined not to present that evidence to the grand jury.[4]

b. Nor did the government withhold exculpatory evidence from petitioner. At trial, petitioner claimed that certain prior inconsistent statements of government witness were evidence favorable to the defense and should have been turned over to him prior to trial (see, *e.g.*, Tr. 418-422, 481-487). The government responded by contending that *Brady* v. *Maryland*, 373 U.S. 83, was inapplicable and that the material was producible only pursuant to the Jencks Act, 18 U.S.C. 3500, with which it had complied.

Whether or not the prior inconsistent statements constituted *Brady* material, petitioner had no right to production of the statements before trial.[5] As the Court recently noted in *United States* v. *Agurs*, 427 U.S. 97, 103, the rule announced in *Brady* applies only to "the discovery, *after trial*, of information which had been known

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[4]While it is true that, after the grand jury had returned the indictment against petitioner, Adams disclosed to the government that he had been mistaken in certain testimony he had given before the grand jury, the government immediately moved to strike those portions of the indictment that had been based upon the erroneous information, and the indictment was amended (Tr. 823, 905, 922-923). Petitioner's claim (Pet. 32) that the indictment was based on perjured testimony is therefore groundless.

[5]In fact, the record plainly rebuts any contention that the government purposely attempted to conceal *Brady* material. The government submitted certain materials to the trial court for its *in camera* inspection, as suggested by the Court in *United States* v. *Agurs*, *supra*, 427 U.S. at 106. That material included statements of Origer, Adams and Zizzo and the 1969-1971 federal income tax returns of Zizzo.

to the prosecution but unknown to the defense" (emphasis added). See also *id.* at 112, n. 20. Here, all relevant statements were turned over to petitioner at trial, and he was able to use those statements to cross-examine Origer (Tr. 544-745), Adams (Tr. 875-921) and Zizzo (Tr. 1111-1134, 1139-1151) extensively on their meetings with the government, their payments to petitioner, and the accuracy of the government's summary of their statements (Tr. 545-546, 909-910).

For example, petitioner questioned Origer about his allegedly exculpatory prior statement that no one had solicited a certain payment from him (Tr. 557-558), his federal income tax liability problems with the government (Tr. 577-588), and his various payments to petitioner. Petitioner also interrogated Adams about his numerous meetings with the United States Attorney's Office (Tr. 906-907) and his testimony before the grand jury (Tr. 866, 894-895, 899-900, 903, 905, 918-920), including his statement about a $10,000 payment to petitioner on January 30, 1971, and he was able to bring out that Adams later informed the government that he had been mistaken about the January 1971 payment and that, as a result, the indictment had been amended (Tr. 905-906). Similarly, petitioner asked Zizzo about his initial representation to the government that petitioner had purchased his home in Florida for $35,000 instead of the actual purchase price of $45,000 (Tr. 1115-1116).

In sum, the disclosure of the witnesses' prior statements during rather than before trial, in accordance with normal procedures and the mandate of the Jencks Act, did not adversely affect petitioner's ability to cross-examine those witnesses or to present his defense. Indeed, petitioner has never demonstrated that he could have "create[d] a reasonable doubt that did not otherwise exist" (*United States*

v. *Agurs, supra,* 427 U.S. at 112) if he had been provided the material prior to trial.

c. Although, as petitioner notes, the courts of appeals have taken divergent views as to the producibility of rough interview notes of government agents (compare *United States* v. *Harris,* 543 F. 2d 1247 (C.A. 9), and *United States* v. *Harrison,* 524 F. 2d 421 (C.A. D.C.), with the cases cited in *Harrison* at 524 F. 2d 421, 430, n. 25), this is not an appropriate case in which to resolve the issue.[6] Origer and Adams expressly attested to the accuracy of the government's summary of their interviews, and petitioner (who was given the summaries) has not suggested any plausible reason to believe that he was prejudiced by the destruction of the rough notes. The evidence clearly showed that petitioner demanded and received numerous illegal payments from certain land developers, that he denied receiving those payments before the grand jury, and that he failed to report those payments as taxable income on his federal income tax returns. Furthermore, he received and used extensive Jencks Act material in cross-examining the government's witnesses. In these circumstances, "no substantial rights of [petitioner] have been affected by the destruction of the rough notes * * * ." *United States* v. *Harris, supra,* 543 F. 2d at 1253.

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[6]We are unaware of any case in which the good faith destruction of rough interview notes in accordance with standard agency practice has led to the reversal of a conviction. In our view, interview notes are not producible under the Jencks Act unless they are "signed or otherwise adopted or approved" by the witness or are a substantially verbatim report of the interview. See 18 U.S.C. 3500(e)(1) and (2); *Goldberg* v. *United States,* 425 U.S. 94, 110-111, n. 19. In any event, this issue is of little continuing importance because the F.B.I. and the I.R.S. have recently changed their internal procedures to require retention of the rough interview notes of their agents.

2. Petitioner's remaining claims (Pet. 18-28, 34-35)—that the district court erred in denying a severance and in refusing to recuse itself—are fully answered by the court of appeals, upon whose opinion we rely. As that court found (Pet. App. 5a), petitioner did not show that he had been prejudiced by joinder of the related offenses, since he "failed to demonstrate that the evidence and issues are so complicated that the jury could not keep separate evidence relating to each count." The court noted that "the only inherent complexity in the case arose from the introduction of banking documents and County Board records. This evidence was merely corroboration of the testimony of key witnesses" (*ibid.*), that the jury was assisted in considering the evidence on each count separately by the trial court's instructions and defense counsel's closing argument (*id.* at 6a), and that the evidence relevant to the Origer counts would have been admissible at a separate trial of the Sellergren counts and vice versa (*id.* at 7a). Therefore, the district court did not abuse its discretion in denying a severance. See *Opper* v. *United States,* 348 U.S. 84, 95.

Similarly, the court of appeals correctly rejected petitioner's allegations of judicial bias. As the court below remarked (Pet. App. 13a), "we can find no basis in the record for finding that the judge exhibited personal bias toward defendant either prior to or during the course of the trial. Nor can we say that defendant has shown a reasonable basis for questioning the judge's impartiality."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys.

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